

AMENDED IN SENATE MARCH 16, 2015

SENATE BILL

No. 178

Introduced by Senators Leno and Anderson

(Principal coauthor: Assembly Member Gatto)

**(Coauthors: Senators Cannella, Gaines, Hertzberg, McGuire,
Nielsen, and Roth)**

*(Coauthors: Assembly Members Chiu, Dahle, Gordon, Maienschein,
Quirk, Steinorth, and Ting, and Weber)*

February 9, 2015

An act to add Chapter 3.6 (commencing with Section 1546) to Title 12 of Part 2 of the Penal Code, relating to privacy.

LEGISLATIVE COUNSEL'S DIGEST

SB 178, as amended, Leno. Privacy: electronic communications: search warrant.

Existing law provides that a search warrant may only be issued upon probable cause, supported by affidavit, naming or describing the person to be searched or searched for, and particularly describing the property, thing, or things and the place to be searched. Existing law also states the grounds upon which a search warrant may be issued, including, among other grounds, when the property or things to be seized consist of any item or constitute any evidence that tends to show a felony has been committed, or tends to show that a particular person has committed a felony, or when there is a warrant to arrest a person.

This bill would prohibit a government entity from compelling the production of or access to electronic communication information or electronic device information, as defined, without a search warrant or wiretap order, except for emergency situations, as defined. The bill would define a number of terms for those purposes, including, among

others, “electronic communication information,” “service provider,” and “electronic device information.” The bill would require a search warrant for electronic communication information to encompass no more information than is necessary to achieve the objective of the search and would impose other conditions on the use of the search warrant or wiretap order and the information obtained, including retention and disclosure. The bill would, subject to exceptions, require a government entity that executes a search warrant or wiretap order pursuant to these provisions to contemporaneously provide notice, as specified, to the identified target, that informs the recipient that information about the recipient has been compelled or requested, and that states the nature of the government investigation under which the information is sought. The bill would authorize a delay of 90 days, subject to renewal, for providing the notice under specified conditions that constitute an emergency. The bill would require the notice to include a copy of the warrant or order or statement describing the emergency under which the notice was delayed. The bill would provide that electronic communication information obtained in violation of these provisions would be inadmissible in a criminal, civil, or administrative proceeding. *The bill would provide that a California or foreign corporation, and its officers, employees, and agents, are not subject to any cause of action for providing records, information, facilities, or assistance in accordance with the terms of a warrant or wiretap order issued pursuant to these provisions.* The bill would also require a government entity that obtains electronic communication information pursuant to these provisions to make an annual report to the Attorney General, and would require the Department of Justice to annually publish a summary of the report on its Internet Web site. By requiring local law enforcement entities to make those annual reports, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. Chapter 3.6 (commencing with Section 1546) is added to Title 12 of Part 2 of the Penal Code, to read:

CHAPTER 3.6. ELECTRONIC COMMUNICATIONS PRIVACY ACT

1546. For purposes of this chapter, the following definitions apply:

(a) An “adverse result” means any of the following:

(1) Danger to the life or physical safety of an individual.

(2) Flight from prosecution.

(3) Imminent destruction of or tampering with evidence.

(4) Intimidation of potential witnesses.

(5) Serious jeopardy to an investigation or undue delay of a trial.

(b) “Authorized possessor” means the possessor of an electronic device when that person is the owner of the device or has been authorized to possess the device by the owner of the device.

(c) “Electronic communication” means the transfer of signs, signals, writings, images, sounds, data, or intelligence of any nature in whole or in part by a wire, radio, electromagnetic, photoelectric, or photo-optical system.

(d) “Electronic communication information” is any information about an electronic communication or the use of an electronic communication service, including, but not limited to, the contents, sender, recipients, format, ~~location, or time~~ *or location* of the sender or recipients at any point during the communication, *the time or date the communication was created, sent, or received*, or any information pertaining to any individual or device participating in the communication, including, but not limited to, an IP address. Electronic communication information does not include subscriber information as defined in this chapter.

(e) “Electronic communication service” is a service that provides to its subscribers or users the ability to send or receive electronic communications, including any service that acts as an intermediary in the transmission of electronic communications, or stores electronic communication information.

(f) “Electronic device” means a device that stores, generates, or transmits information in electronic form.

(g) “Electronic device information” means any information stored on or generated through the operation of an electronic device, including the current and prior locations of the device.

(h) “Government entity” means a department or agency of the state or a political subdivision thereof, or an individual acting for or on behalf of the state or a political subdivision thereof.

(i) “Service provider” means a person or entity offering an electronic communication service.

(j) “Specific consent” is consent delivered directly to the government entity seeking information that is given in response to a specific request and is valid only for a specified period of time. ~~Specific consent may be withdrawn at any time.~~ *information.*

(k) “Subscriber information” means the name, street address, ~~phone~~ *telephone* number, email address, or similar contact information provided by the subscriber to the provider ~~of an electronic communication service for the purpose of establishing a communication channel between that subscriber and that provider;~~ *to establish or maintain an account or communication channel,* a subscriber or account number or identifier, the length of service, and the types of services used by a user of or subscriber to a service provider.

1546.1. (a) Except as provided in this section, a government entity shall not do any of the following:

(1) Compel the production of or access to electronic communication information from a service provider.

(2) Compel the production of or access to electronic device information from any person or entity except the authorized possessor of the device.

(3) Access electronic device information by means of physical interaction or electronic communication with the device, except with the specific consent of the authorized possessor of the device.

(b) A government entity may compel the production of or access to electronic communication information or electronic device information, or access electronic device information by means of physical interaction or electronic communication with the device, subject to subdivision (c) and only pursuant to a wiretap order pursuant to Chapter 1.4 (commencing with Section 629.50) of Title 15 of Part 1, or pursuant to a search warrant pursuant to Chapter 3 (commencing with Section 1523), provided that the warrant shall not compel the production of or authorize access to

1 the contents of any electronic communication initiated after the
2 issuance of the warrant.

3 *(c) A government entity may access electronic device*
4 *information by means of physical interaction or electronic*
5 *communication with the device only as follows:*

6 *(1) In accordance with a wiretap order issued pursuant to*
7 *Chapter 1.4 (commencing with Section 629.50) of Title 15 of Part*
8 *1 or in accordance with a search warrant issued pursuant to*
9 *Chapter 3 (commencing with Section 1523), provided that a*
10 *warrant shall not authorize accessing the contents of any electronic*
11 *communication initiated after the issuance of the warrant.*

12 *(2) With the specific consent of the owner or authorized*
13 *possessor of the device, when a government entity is the intended*
14 *recipient of an electronic communication initiated by the owner*
15 *or authorized possessor of the device.*

16 *(3) With the specific consent of the owner of the device when*
17 *the device has been reported as lost or stolen.*

18 *(4) If the government entity, in good faith, believes that an*
19 *emergency involving imminent danger of death or serious physical*
20 *injury to any person requires access to the electronic device*
21 *information.*

22 *(5) If the government entity, in good faith, believes the device*
23 *to be lost, stolen, or abandoned, provided that the entity shall only*
24 *access electronic device information in order to attempt to identify,*
25 *verify, or contact the owner or authorized possessor of the device.*

26 *(e)*

27 *(d) Any warrant or wiretap order for electronic communication*
28 *information or electronic device information shall comply with*
29 *the following:*

30 *(1) The warrant or order shall be limited to only that information*
31 *necessary to achieve the objective of the warrant or wiretap order,*
32 *including by specifying the target individuals or accounts, the*
33 *applications or services, the types of information, and the time*
34 *periods covered, as appropriate.*

35 *(2) The warrant or order shall identify the effective date upon*
36 *which the warrant is to be executed, not to exceed 10 days from*
37 *the date the warrant is signed, or explicitly state whether the*
38 *warrant or wiretap order encompasses any information created*
39 *after its issuance.*

(3) The *warrant or* order shall comply with all other provisions of California and federal law, including any provisions prohibiting, limiting, or imposing additional requirements on the use of search warrants or wiretap orders.

~~(d)~~

(e) When issuing any warrant or wiretap order for electronic communication information or electronic device information, a court may, at its discretion, do any or all of the following:

(1) Appoint a special master, as described in subdivision (d) of Section 1524, charged with ensuring that only information necessary to achieve the objective of the warrant or order is produced or accessed.

(2) Require that any information obtained through the execution of the warrant or order that is unrelated to the objective of the warrant be destroyed as soon as feasible after that determination is made.

~~(e)~~

(f) A service provider may disclose, but shall not be required to disclose, electronic communication information or subscriber information when that disclosure is not otherwise prohibited by law.

~~(f)~~

(g) If a government entity receives electronic communication information voluntarily provided pursuant to subdivision ~~(e)~~ (f), it shall delete that information within 90 days unless the entity has or obtains the specific consent of the sender or recipient of the electronic communications about which information was disclosed or obtains a court order authorizing the retention of the information. A court shall issue a retention order upon a finding that the conditions justifying the initial voluntary disclosure persist, in which case the court shall authorize the retention of the information only for so long as those conditions persist, or there is probable cause to believe that the information constitutes evidence that a crime has been committed.

~~(g)~~

(h) If a government entity requests that a service provider disclose information, *or if the government entity obtains information, pursuant to an emergency—under either Section 2702(b)(8) or 2702(e)(4) of Title 18 U.S.C., involving danger of death or serious physical injury to a person, that requires access*

1 *to the electronic information without delay*, the entity shall, within
 2 three days after seeking disclosure, file with the appropriate court
 3 a motion seeking approval of the requested emergency disclosures
 4 that shall set forth the facts giving rise to the emergency. The court
 5 shall promptly rule on the motion and shall order the immediate
 6 destruction of all information received in response to the request
 7 upon a finding that the facts did not give rise to an ~~emergency~~
 8 ~~under either Section 2702(b)(8) or 2702(c)(4) of Title 18 U.S.C.~~
 9 *emergency*.

10 (i) *This section does not limit the authority of a governmental*
 11 *entity to use an administrative, grand jury, trial, or civil discovery*
 12 *subpoena to do either of the following:*

13 (1) *Require an originator, addressee, or intended recipient of*
 14 *an electronic communication to disclose any electronic*
 15 *communication information associated with that communication.*

16 (2) *Require an entity that provides electronic communications*
 17 *services to its officers, directors, employees, or agents to disclose*
 18 *electronic communication information associated with an*
 19 *electronic communication to or from an officer, director, employee,*
 20 *or agent of the entity.*

21 1546.2. (a) Except as otherwise provided in this section, any
 22 government entity that executes a warrant or wiretap order or issues
 23 an emergency request pursuant to Section 1546.1 shall
 24 contemporaneously serve upon, or deliver by registered or
 25 first-class mail, electronic mail, or other means reasonably
 26 calculated to be effective, the identified targets of the warrant,
 27 order, or emergency request, a notice that informs the recipient
 28 that information about the recipient has been compelled or
 29 requested, and states with reasonable specificity the nature of the
 30 government investigation under which the information is sought.
 31 The notice shall include a copy of the warrant or order, or a written
 32 statement setting forth facts giving rise to the emergency.

33 (b) If there is no identified target of a warrant, wiretap order,
 34 or emergency request at the time of its issuance, the government
 35 entity shall take reasonable steps to provide the notice, within three
 36 days of the execution of the warrant, to all individuals about whom
 37 information was disclosed *or obtained*.

38 (c) (1) When a wiretap order or search warrant is sought under
 39 Section 1546.1, the government entity may ~~include in the~~
 40 ~~application~~ *submit* a request supported by a sworn affidavit for an

1 order delaying notification and prohibiting ~~the any party on whom~~
2 ~~the warrant or order is served from notifying the subject of the~~
3 ~~warrant or order, providing information from notifying any other~~
4 ~~party that information has been sought.~~ The court shall ~~grant the~~
5 ~~request~~ *issue the order* if the court determines that there is reason
6 to believe that notification ~~of the existence of the warrant~~ may
7 have an adverse result, but only for the period of time that the court
8 finds there is reason to believe that the ~~warrant~~ notification may
9 have that adverse result, and not to exceed 90 days.

10 (2) The court may grant extensions of the delay of up to 90 days
11 each on the same grounds as provided in paragraph (1).

12 (3) Upon expiration of the period of delay of the ~~warrant~~
13 notification, the government entity shall serve upon, or deliver by
14 registered or first-class mail, electronic mail, or other means
15 reasonably calculated to be effective as specified by the court
16 issuing the ~~warrant~~ *order authorizing delayed notification*, each
17 individual whose electronic communication information was
18 acquired, a document that includes the information described in
19 subdivision (a), a copy of all information disclosed or a summary
20 of that information, including, at a minimum, the number and types
21 of records disclosed, the date and time when the earliest and latest
22 records were created, and a statement of the grounds for the court's
23 determination to grant a delay in notifying the individual.

24 ~~(4)~~
25 (d) Except as otherwise provided in this section, nothing in this
26 chapter shall prohibit or limit a service provider or any other party
27 from disclosing information about any request or demand for
28 electronic communication information or electronic device
29 information.

30 1546.4. (a) Except as proof of a violation of this chapter, no
31 evidence obtained or retained in violation of this chapter shall be
32 admissible in a criminal, civil, or administrative proceeding, or
33 used in an affidavit in an effort to obtain a search warrant or court
34 order.

35 (b) The Attorney General may commence a civil action to
36 compel any government entity to comply with the provisions of
37 this chapter.

38 (c) If a warrant or wiretap order does not comply with this
39 chapter, a service provider, any other recipient of the warrant or
40 wiretap order, or any individual whose information is targeted by

1 the warrant or wiretap order, may petition the issuing court to void
2 or modify the warrant or wiretap order or to order the destruction
3 of any information obtained in violation of this chapter.

4 *(d) A California or foreign corporation, and its officers,*
5 *employees, and agents, are not subject to any cause of action for*
6 *providing records, information, facilities, or assistance in*
7 *accordance with the terms of a warrant or wiretap order issued*
8 *pursuant to this chapter.*

9 1546.6. A government entity that obtains electronic
10 communication information pursuant to this chapter shall make
11 an annual report to the Attorney General. The report shall be made
12 on or before February 1, 2017, and each February 1 thereafter. To
13 the extent it can be reasonably determined, the report shall include
14 all of the following:

15 (a) The number of requests or demands for electronic
16 communication information.

17 (b) The number of requests or demands made, and the number
18 of records received for each of the following types of records:

19 (1) Electronic communication content.

20 (2) Location information.

21 (3) Electronic device information.

22 (4) Other electronic communication information.

23 (c) For each of the types of records listed in subdivision (b), all
24 of the following:

25 (1) The number of requests or demands that were each of the
26 following:

27 (A) Wiretap orders obtained pursuant to this chapter.

28 (B) Search warrants obtained pursuant to this chapter.

29 (C) Emergency requests pursuant to subdivision~~(g)~~ (h) of
30 Section 1546.1.

31 (2) The total number of users whose information was requested
32 or demanded.

33 (3) The total number of requests or demands that did not specify
34 a target individual.

35 (4) The number of requests or demands complied with in full,
36 partially complied with, or refused.

37 (5) The number of times the notice to the affected party was
38 delayed and the average length of the delay.

1 (6) The number of times records were shared with other
2 government entities or any department or agency of the federal
3 government, and the agencies with which the records were shared.

4 (7) For contents of electronic communications, the total number
5 of communications contents received.

6 (8) For location information, the average period for which
7 location information was obtained or received and the total number
8 of location records received.

9 (9) For other electronic communication information, the types
10 of records requested and the total number of records of each type
11 received.

12 1546.8. (a) On or before April 1, 2017, and each April 1
13 thereafter, the Department of Justice shall publish on its Internet
14 Web site both of the following:

15 (1) The individual reports from each government entity that
16 requests or compels the production of contents or records pertaining
17 to an electronic communication or location information.

18 (2) A summary aggregating each of the items in subdivisions
19 (a) to (c), inclusive of Section 1546.6.

20 (b) Nothing in this chapter shall prohibit or restrict a service
21 provider from producing an annual report summarizing the
22 demands or requests it receives under this chapter.

23 SEC. 2. If the Commission on State Mandates determines that
24 this act contains costs mandated by the state, reimbursement to
25 local agencies and school districts for those costs shall be made
26 pursuant to Part 7 (commencing with Section 17500) of Division
27 4 of Title 2 of the Government Code.